

1 UNITED STATES DISTRICT COURT  
2  
3

WESTERN DISTRICT OF NEW YORK

3 - - - - - X  
4 KIMBERLY CHIAPPERINI, ET AL., 14-CV-6281(L)  
5 PLAINTIFFS

vs.

5 GANDER MOUNTAIN COMAPNY, INC., Rochester, New York  
6 DAWN NGUYEN, AND THE ESTATE July 28, 2014  
7 OF WILLIAM SPENGLER, 3:45 p.m.  
8 DEFENDANTS.

- - - - - X

8 TRANSCRIPT OF PROCEEDINGS  
9 BEFORE THE HONORABLE DAVID G. LARIMER  
10 UNITED STATES DISTRICT JUDGE11 JONATHAN E. LOWY, ESQ.  
12 1225 Eye Street NW, Suite 1100  
13 Washington, DC 20005  
14 - and -  
15 ARNOLD & PORTER  
16 BY: MICHAEL D. SCHISSEL, ESQ.  
17 ERIC LEE, ESQ.  
18 399 Park Avenue  
19 New York, New York 10022  
20 - and -  
21 WOODS OVIATT GILMAN LLP  
22 BY: DONALD W. O'BRIEN, JR., ESQ.  
23 700 Crossroads Building  
24 Two State Street  
25 Rochester, New York 14614  
Appearing on behalf of the PlaintiffsGOLDBERG SEGALLA, LLP  
11 Martine Avenue, 7th Floor  
White Plains, New York 10606  
Appearing on behalf of the DefendantsCOURT REPORTER: Christi A. Macri, FAPR, RMR, CRR, CRI  
Kenneth B. Keating Federal Building  
100 State Street, Room 4240  
Rochester, New York 14614

1                   **P R O C E E D I N G S**

2                   \*               \*               \*

3                   **THE COURT:** All right. Good afternoon, all.

4                   **MR. LOWY:** Good afternoon.

03:47:51PM 5                   **MR. STAPLETON:** Good afternoon.

6                   **THE COURT:** We are here on the plaintiffs' motion to  
7 remand this case to state court, motion brought by defendant  
8 Gander Mountain Company.

9                   Why don't we have appearances for plaintiff?

03:48:15PM10 Mr. O'Brien?

11                  **MR. SCHISSEL:** For the plaintiffs, Mike Schissel  
12 from Arnold & Porter, and also with me is Eric Lee. My last  
13 name is spelled S-C-H-I-S-S-E-L as in Sam, E-L. Schissel.

14                  **THE COURT:** Schissel?

03:48:30PM15                  **MR. SCHISSEL:** Schissel.

16                  **THE COURT:** I'm sorry, Schissel.

17                  **MR. SCHISSEL:** One of my colleagues from Arnold &  
18 Porter, Eric Lee, is also with me.

19                  **THE COURT:** Okay. Who will be carrying the rowing  
03:48:41PM20 oar here in terms of argument?

21                  **MR. SCHISSEL:** I will be, Your Honor.

22                  **THE COURT:** Okay. It's nice to see Mr. O'Brien  
23 here.

24                  **MR. O'BRIEN:** Yes, Your Honor, for the plaintiffs.

03:48:49PM25                  **THE COURT:** Okay. Appearing for Gander Mountain?

1                   **MR. STAPLETON:** For defendant Gander Mountain, Brian  
2 T. Stapleton, S-T-A-P-L-E-T-O-N, trial counsel from Goldberg  
3 Segalla. My office is located at 11 Martine Avenue in White  
4 Plains, New York 10606. Good afternoon, Your Honor.

03:49:08PM 5                   **THE COURT:** Good afternoon. Perhaps Mr. Schissel  
6 and Mr. Stapleton could join me up here at the lecterns and  
7 we'll see what we can do here.

8                   You can explain to me what this is all about.  
9 Actually, I think I know exactly what it's all about.

03:49:33PM10                  I guess, Mr. Stapleton, first off, since I know  
11 you're admitted to this court, I don't think you received  
12 leave to file a brief exceeding our local rule, a 25 page  
13 requirement. Do you wish to make that application now?

14                  **MR. STAPLETON:** Your Honor, I apologize for not  
03:49:52PM15 doing so and yes, I do wish to ask the Court to accept our  
16 oversize briefing.

17                  **THE COURT:** All right, we'll grant that.

18                  **MR. STAPLETON:** Thank you, Your Honor.

19                  **THE COURT:** Try to, I guess, Mr. Stapleton, I will  
03:50:08PM20 start with you first. What legal authority, either in the  
21 statute or by case law, do you have that this kind of action,  
22 which implicates, I don't know if you pronounce the acronym  
23 PLCAA or the Protection of Lawful Commerce and Arms Act.

24                  Is PLCAA an acceptable acronym?

03:50:36PM25                  **MR. STAPLETON:** I honestly don't know, Your Honor.

1                   **THE COURT:** I don't either.

2                   **MR. SCHISSEL:** That's the way we refer to it, Your  
3 Honor.

4                   **MR. STAPLETON:** I just say PLCAA.

03:50:44PM 5                   **THE COURT:** I like PLCAA.

6                   **MR. STAPLETON:** PLCAA.

7                   **THE COURT:** What legal authority do you have that  
8 PLCAA, the statute passed back in 2005, I think, preempts this  
9 court from having jurisdiction over the matter? Start with  
03:51:02PM10 the statute. Is there anything in the statute that says that?

11                  **MR. STAPLETON:** That says this court -- that  
12 preempts this court from having jurisdiction?

13                  **THE COURT:** Yeah.

14                  **MR. STAPLETON:** There is nothing in the statute by  
03:51:11PM15 its terms that preempts this court from exercising  
16 jurisdiction, if I understood Your Honor correctly.

17                  **THE COURT:** Isn't that part of your argument here  
18 that, I'm sorry, I misspoke. State court.

19                  **MR. STAPLETON:** State court.

03:51:24PM20                  **THE COURT:** I'm sorry, state court. What in the  
21 statute preempts New York state court from entertaining the  
22 action?

23                  **MR. STAPLETON:** Well, because the statute under  
24 7902, Your Honor, precludes the commencement of a qualified  
03:51:41PM25 civil liability action in any court, anywhere, and that would

1 include federal court or state court.

2                   **THE COURT:** Well, but I think you would agree that  
3 the statute doesn't, unlike some other statutes that Congress  
4 has passed which very specifically say, for instance, I think  
03:52:01PM 5 ERISA might be one, that federal law and federal court  
6 preempts any action in state court. This to me does not seem  
7 to be that kind of statute.

8                   Since it, as you know, by its very terms it refers  
9 to the fact that any action brought in state or federal court,  
03:52:21PM10 if it's a qualified action, is barred or precluded.

11                  So I -- I don't think the statute automatically  
12 precludes state court from handling this under the preemption  
13 doctrine. If you have case law that suggests that or says  
14 that, we haven't found any.

03:52:41PM15               **MR. STAPLETON:** I do not have case law which says  
16 that the -- that PLCAA automatically precludes a state court  
17 from adjudicating the action. And there are more than one  
18 example in which a state court has interpreted PLCAA to have a  
19 preclusive effect. That is not the heart of our argument,  
03:53:03PM20 Your Honor.

21                  **THE COURT:** I thought it was. I thought the gist of  
22 the argument was that the -- you also raise federal question  
23 jurisdiction and suggestion that the state courts might be  
24 biased in somewise.

03:53:15PM25               But I thought the gist of your argument was that

1 there is a preemption argument here that makes this case  
2 amenable to or properly prosecuted in federal court, not state  
3 court. I don't think the statute supports that.

4                   **MR. STAPLETON:** Well, Your Honor, we are -- our  
03:53:38PM 5 argument is that PLCAA completely eviscerates the common law  
6 and prohibits the commencement of a qualified legal -- a  
7 qualified civil liability action in any jurisdiction.

8                   The complement to that argument is that this is  
9 inherently a federal question and, therefore, removal is  
03:54:01PM10 proper to this court.

11                  **THE COURT:** What does that mean, it's inherently a  
12 federal question? I don't know what that means.

13                  **MR. STAPLETON:** Well, we believe that because --  
14 because PLCAA has a preemptive effect and we don't -- to be  
03:54:13PM15 clear, we are not claiming that PLCAA is completely preemptive  
16 in the way that ERISA is or -- and NLRB matters are.

17                  But they -- but PLCAA completely preempts a  
18 specified subset of actions brought against qualified sellers  
19 of qualified products.

03:54:34PM20                  That is not in favor -- that is not in favor, Your  
21 Honor, of federal court over state court, but it is -- it is  
22 in any jurisdiction period, end of story.

23                  The issue of whether or not --

24                  **THE COURT:** That's a big concession, though. I  
03:54:49PM25 think what you're saying is some judge is going to have to

1 decide whether this particular lawsuit is barred by PLCAA, to  
2 use your acronym, and you suggest it should be me, and the  
3 plaintiffs suggest, no, there's no reason why a state judge  
4 can't make the same kind of analysis.

03:55:06PM 5                   **MR. STAPLETON:** Your Honor, the issue -- the issue  
6 of whether the removal -- the only issue we're here today to  
7 decide is whether removal to this court was proper.

8                   **THE COURT:** I agree.

9                   **MR. STAPLETON:** And removal to this court was proper  
03:55:19PM10 because of PLCAA's preemptive effect and the fact that none of  
11 the plaintiffs' claims stand or fall independently of PLCAA.

12                   Every single one of plaintiffs' causes of action  
13 must be analyzed through the prism of PLCAA before it can be  
14 said to go forward, and that is a federal question.

03:55:42PM15                   The --

16                   **THE COURT:** That's easy to say, but I think the  
17 plaintiffs would suggest that it's not necessarily so. They  
18 are garden variety state claims and, admittedly, there are  
19 some hurdles that PLCAA imposes.

03:55:58PM20                   But the second question I wanted to ask you, and I  
21 think you've already answered it, you admit that PLCAA does  
22 not bar all actions against firearms manufacturers and  
23 dealers.

24                   I think you have to agree that the statute says  
03:56:13PM25 there are certain actions that are not barred by PLCAA. Some

1 have to do with product liability, which are not, you know,  
2 defects in the product, which we're not talking about, but  
3 there seem to me to be other sections under the statute --  
4 well, you know what they are, Section 5 of the statute, 79 --

03:56:39PM 5                   **MR. STAPLETON:** 7905(a).

6                   **THE COURT:** 7903(5), they list several exceptions.  
7 Negligent entrustment or negligence per se, the seller  
8 knowingly violated a state or federal statute, and that that  
9 violation was the proximate cause.

03:56:56PM 10                  It seems to me you have to concede that not every  
11 action involving a firearm bought from a manufacturer or  
12 seller is barred by PLCAA.

13                  Can we at least agree on that.

14                  **MR. STAPLETON:** Judge, we can't.

03:57:09PM 15                  And I will even go further and say that had this  
16 complaint been drafted to only contain counts for negligent  
17 entrustment or negligence per se, we wouldn't be standing  
18 here.

19                  Those actions, if well pleaded, fall within the  
03:57:22PM 20 narrowly defined exceptions to PLCAA. However, that's not the  
21 case here. There are -- the majority of the plaintiffs'  
22 causes of action are expressly prohibited by the statute in  
23 that there are -- in that the language of the statute is very,  
24 very clear.

03:57:38PM 25                  For example, Your Honor, we discuss in our brief

1 the issue, the claim of negligent training and supervision for  
2 which the plaintiffs have not alleged any predicate statutes,  
3 for which there is no common law basis and which are expressly  
4 prohibited per the intent of the people who wrote the statute.

03:58:00PM 5                   Their corollary request for relief, which is an  
6 injunction tagged on to and relating to the negligent training  
7 and supervision, is a clearly prohibited qualified civil  
8 liability action.

9                   Now, the same could be said, Your Honor, for  
03:58:16PM10 Count 7, which is public nuisance.

11                   Counts 8 -- actually, the remainder of the counts,  
12 Counts 7 through 12, which are public nuisance, loss of  
13 consortium, wrongful death and survival.

14                   Congress enacted a series of very narrowly tailored  
03:58:30PM15 exceptions to the prohibitive effect of a statute. Had they  
16 wished to allow a public nuisance claim or a wrongful death  
17 claim or loss of consortium claim go forward, they could and  
18 would have done so. They did not.

19                   **THE COURT:** Let me just -- before it gets too far  
03:58:47PM20 away and I forget my question --

21                   **MR. STAPLETON:** Sure.

22                   **THE COURT:** -- I thought that in the reply to your  
23 motion, that the plaintiffs suggested that in some way you  
24 recognized that some claims brought by the plaintiff might  
03:59:05PM25 come within the ambit of the exceptions of Section 7903(5)

1 because I thought, Mr. Schissel -- am I saying that right?

2                   **MR. SCHISSEL:** That's correct, Your Honor.

3                   **THE COURT:** That in your papers you suggested that  
4 the motion to dismiss that was filed relatively close to the  
03:59:24PM 5 motion to remand only challenged certain of the causes of the  
6 complaint.

7                   Am I accurate or --

8                   **MR. SCHISSEL:** That's absolutely correct, Your  
9 Honor. It only challenged two of our 12 counts.

03:59:37PM10                   **THE COURT:** So I guess, Mr. Stapleton, doesn't that  
11 suggest that by dint of your motion, that you recognize there  
12 are some claims against manufacturers and dealers that might  
13 come within the ambit of 7903(5)?

14                   Well, I guess that's my question.

04:00:03PM15                   **MR. STAPLETON:** And the answer is respectfully, Your  
16 Honor, no, for two reasons. One, the prohibitive operative  
17 language of the statute is 7902, which is very simple, it's a  
18 single sentence: Qualified civil liability actions are  
19 prohibited.

04:00:19PM20                   Relying on the fact that we made a motion under  
21 12(b)(6), which was made not coincidentally, Your Honor,  
22 before Dawn Nguyen pleaded guilty before you to a specific  
23 federal statute in which she admitted that she lied with the  
24 intent to deceive Gander Mountain is of no moment and no  
04:00:41PM25 bearing on this motion for remand.

1                   A 12(b)(6) motion, as you know, Your Honor, has a  
2 very, very different and lower standard than a Rule 56 motion.

3                   And that motion, our 12(b)(6) motion was filed with  
4 knowledge and respect of the low threshold pleading standards  
04:01:01PM 5 and made before Ms. Nguyen pleaded guilty to lying with the  
6 intent to deceive Gander Mountain before you.

7                   **THE COURT:** I don't know what her pleading has to do  
8 with this.

9                   **MR. STAPLETON:** Your Honor, I bring it up because it  
04:01:15PM10 speaks to the arrows we had in our quiver at the time we made  
11 the motion and are without -- without respect to what the  
12 PLCAA had to say, but more with respect to the facts that we  
13 had or did not have at the time we made our motion.

14                   **THE COURT:** Well, let me ask you about something  
04:01:36PM15 that I think you concede in your papers, that generally in  
16 removal situations, the fact there might be a federal defense  
17 to a lawsuit is generally, in my view, universally the rule  
18 that that does not state a valid reason for removal.

19                   The plaintiff has some right to choose the nature  
04:01:57PM20 of his or her or its complaint and the forum, and the fact  
21 that there might be a defense under federal law does not  
22 constitute, in my view, a federal question or give you the  
23 basis to remove the case.

24                   And I think the plaintiffs have suggested that's  
04:02:15PM25 really what you did in your initial motion to remove, that you

1 suggested there were some federal issues under the statute,  
2 and, therefore, you should leap frog from state court to  
3 federal court.

4                 This PLCAA statute seems to me to be a shield to  
04:02:36PM 5 certain actions, not all, but certain actions which should be  
6 raised in the proper forum and the proper place at the proper  
7 time.

8                 I mean, isn't this just like any other defense  
9 that's raised in an action that generally does not allow, does  
04:02:53PM10 not warrant, does not justify removal just based on the fact  
11 there's a federal, possible federal defense?

12                 **MR. STAPLETON:** No, categorically no, categorically  
13 no. The characterization --

14                 **THE COURT:** Tell me why.

04:03:08PM15                 **MR. STAPLETON:** -- the characterization --

16                 **THE COURT:** I get your answer is no, but tell me  
17 why. That was pretty clear.

18                 Did you get that down, Ms. Macri?

19                 **THE REPORTER:** I did.

04:03:16PM20                 **MR. STAPLETON:** Your Honor, the characterization of  
21 PLCAA as an affirmative defense is a gross misrepresentation  
22 of its statutory purpose. PLCAA is not an affirmative  
23 defense. PLCAA is not a shield. It is a sword.

24                 The issue of preemption --

04:03:28PM25                 **THE COURT:** How can it be a sword if it bars certain

1 actions? It says you can't bring certain actions, they call  
2 them qualified actions. They list certain exceptions,  
3 exemptions. But -- well, all right. I'll hear your argument.  
4 I think Mr. Schissel might differ somewhat.

04:03:48PM 5                   **MR. STAPLETON:** I'm sure my colleague across the  
6 aisle does differ with me, but the issue of preemption is not  
7 an affirmative defense reserved for trial. The language of  
8 the statute is very clear. The language of the statute says  
9 qualified civil liability actions are entitled to immediate  
04:04:04PM10 dismissal.

11                   The Federal Rules of Civil Procedure allow for a  
12 motion --

13                   **THE COURT:** In either state or federal court.

14                   **MR. STAPLETON:** Your Honor, it doesn't say -- Your  
04:04:12PM15 Honor, it does not say only in federal court. But the issue  
16 of preemption, Judge, the issue of preemption is inherently a  
17 federal question.

18                   Preemption is not an affirmative defense, but a  
19 challenge to a court's jurisdiction.

04:04:27PM20                   **THE COURT:** Well, if Congress wanted us to focus on  
21 preemption, if Congress wanted to take this out of the state  
22 courts into federal court, don't you think they have the  
23 wherewithal and the knowledge as to how to do that?

24                   They are capable of doing some things and I think  
04:04:41PM25 this would be one that they could say, you know, the federal

1 interest is so great that only litigation in federal court is  
2 warranted, and they certainly didn't say that.

3                   And I don't think the legislative history supports  
4 that. You know, you can read the statute, it's not very long.  
04:04:56PM 5 But it certainly doesn't say -- in fact, it specifically says  
6 that you can't use any part of the statute as sort of a  
7 lynchpin to create a cause of action.

8                   So if it's not a defense and a shield, I mean, it  
9 protects defendants from being sued in certain kinds of  
04:05:13PM10 actions. If that's not a defense, I don't know what is.

11                  **MR. STAPLETON:** Well, Your Honor, the assessment of  
12 the preemptive effect of congressional enactment termination,  
13 of congressional intent and the boundaries and character of a  
14 preemptive congressional enactment is a question of federal  
04:05:29PM15 law.

16                  It's an antecedent federal question. And the  
17 simple fact that the congressional enactment of prohibiting  
18 qualified civil liability claims in any jurisdiction certainly  
19 does not defeat the defendants' right to have the scope and  
04:05:48PM20 extent of a federal statute prohibiting a subset of qualified  
21 actions against a qualified seller, it doesn't invalidate our  
22 basis for removal.

23                  **THE COURT:** Let me hear from, before we get too far  
24 afield, I don't want Mr. Schissel to think we've forgotten  
04:06:09PM25 about him.

1                   What say you to my comment that I view this PLCAA  
2 statute, if you will, as creating a defense to certain actions  
3 brought against manufacturers and dealers?

4                   Mr. Stapleton said no, no, no way. No bloody way I  
04:06:34PM 5 think he said.

6                   **MR. SCHISSEL:** He said categorically no,  
7 categorically no. I believe that's what he said.

8                   **THE COURT:** All right. So why -- am I missing  
9 something?

04:06:43PM10                  **MR. SCHISSEL:** Your Honor, I think you're right on  
11 and it's not just me saying it. The Courts have said it. Let  
12 me just back up and get to PLCAA as a defense.

13                  Counsel's lead argument, as I understand it,  
14 they've abandoned the arguments they made in their original  
04:07:00PM15 notice of removal and they're relying on complete preemption  
16 doctrine, which they go through extensively starting at page  
17 13 of their brief.

18                  What the case law says, the Supreme Court and a  
19 Western District of New York case that we cited, 2010 *In Re:*  
04:07:16PM20 *Air Crash*, to have complete -- complete preemption, complete  
21 federal preemption over state law claims, the federal statute  
22 has to, quote, substitute a federal remedy for that law.

23                  The PLCAA statute expressly says --

24                  **THE COURT:** Like ERISA?

04:07:36PM25                  **MR. SCHISSEL:** Like ERISA. The PLCAA statute -- we

1 cite this in our brief, it says explicitly it is not creating  
2 a federal remedy of law.

3 It says -- 15, U.S.C., 7903(5)(C) says, quote, no  
4 provision of this chapter shall be construed to create a  
04:07:54PM 5 public or private cause of action or remedy.

6 So all it is, Your Honor, is it is a defense. What  
7 it says is -- and what counsel is doing, respectfully, is he's  
8 conflating his merits argument that our claims are barred by  
9 PLCAA with the matter of subject matter jurisdiction, which is  
04:08:17PM 10 what we're here today to discuss.

11 **THE COURT:** I mean, at some point in time they may  
12 be deemed to be barred.

13 **MR. SCHISSEL:** They may be. If we lose, they may be  
14 barred. But for purposes of today, the Second Circuit says in  
04:08:33PM 15 the *City of New York vs. Mickalis Pawn Shop* case,  
16 Second Circuit 2011, it was a PLCAA case and it says, quote,  
17 PLCAA simply does not speak in jurisdictional terms or refer  
18 in any way to the jurisdiction of the district courts.

19 It is not a jurisdictional statute, Your Honor.

04:08:56PM 20 And all it does is create a defense for certain  
21 types of lawsuits, but also allows certain types of claims to  
22 proceed, claims that we've alleged in our complaint.

23 Now, counsel says preemption is a matter of federal  
24 jurisdiction that Your Honor needs to decide, that the state  
04:09:15PM 25 court cannot decide it.

1           But they cite in their brief a case called  
2 *Franchise Tax Board*, which is a U.S. Supreme Court from 1983  
3 that says even when the defense is federal preemption, that  
4 does not create federal jurisdiction.

04:09:30PM 5           That's an issue that state court can decide if  
6 there's no other -- no other grounds for federal jurisdiction.

7           In this case there is no diversity. There is no  
8 federal question. All they have and all they're asserting is  
9 PLCAA, a federal statute, as a defense to our common law tort  
04:09:48PM10 claims, negligence, wrongful death, et cetera.

11           And so I think, Your Honor, it's probably a long  
12 way of answering your question, but I think you have it  
13 exactly right not just because I think so, but because the  
14 cases say so.

04:10:00PM15           There was a case just like this, Your Honor, we  
16 cite in our brief, the only one we could ever find where the  
17 gun industry actually asserts this preemption type argument in  
18 a PLCAA case and that was out in the District of Montana, the  
19 *Woods* case. And there the judge said it's not a  
04:10:14PM20 jurisdictional statute. A negligence claim that alleges  
21 federal violations is still a state law negligence claim.

22           **THE COURT:** The *Woods* case, noted senior judge,  
23 discussed many of the same issues that we have here and a  
24 thoughtful opinion.

04:10:35PM25           **MR. SCHISSEL:** Your Honor, I also wanted to make one

1 procedural argument that Your Honor has not asked about.

2                   In their notice of removal, they made two very  
3 specific arguments. They said PLCAA is a defense, a federal  
4 defense. And they said we've alleged violations of federal  
04:10:52PM 5 law in our case was the standard for negligence.

6                   In the opposition to our petition, motion to  
7 remand, they make these three new arguments, complete  
8 preemption, the interstate commerce argument and the argument  
9 that state courts can't be fair to them.

04:11:15PM10                 Those were not pled in the notice of removal and  
11 the 30 days to assert grounds for removal have long passed.

12                 There are cases and, Your Honor, we cited one  
13 case -- we found three other cases in the Second Circuit, one  
14 Second Circuit case and two district court cases.

04:11:33PM15                 I'm prepared to hand them up to Your Honor or give  
16 you the cites that say you can't amend your notice of removal  
17 in the context of a motion for remand.

18                 There was one case, and I can give you the cites  
19 for them, where the defendant removed saying that -- that the  
04:11:51PM20 diversity grounds, saying that the amount in controversy  
21 exceeded \$50,000, even though the jurisdictional limit is  
22 \$75,000. And the Court denied the application to amend  
23 because it was too late, and the Court deemed that  
24 substantive.

04:12:06PM25                 I think now trying to effectively amend by adding

1 these three federal preemption and constitutional and fairness  
2 arguments is even more substantive than an error like that,  
3 Your Honor, so I think it's too late to make these arguments.

4                   **THE COURT:** Mr. Stapleton, what say you about that?

04:12:23PM 5 There is a lot of law that talks about when you make your  
6 application to remove, that you can't add subsequent arguments  
7 after the 30-day period.

8                   **MR. STAPLETON:** Well, Your Honor, I begin with the  
9 recognition that Mr. Schissel is mischaracterizing our notice  
04:12:40PM10 of removal.

11                  The words "affirmative defense" don't appear in  
12 that notice of removal and I would challenge Mr. Schissel to  
13 show me where they do. So they don't appear there, Your  
14 Honor.

04:12:50PM15                  **THE COURT:** I read the notice of removal today, and  
16 I also read your more recent papers which are certainly much  
17 more expansive and develop arguments that I don't think you  
18 can glean from the four corners of the notice of removal.

19                  **MR. STAPLETON:** Your Honor, the notice of removal  
04:13:06PM20 speaks of the preclusive effect of the Protection of Lawful  
21 Commerce and Arm Acts -- Protection of Lawful Commerce and  
22 Arms Act.

23                  It does never and it does not describe PLCAA as an  
24 affirmative defense. It says that the -- that the plaintiffs'  
04:13:24PM25 claims are precluded by PLCAA. That's the language that's in

1 there.

2 Mr. Schissel cites to a case that was decided in  
3 1983, more than 15 years before PLCAA was decided. So that's  
4 certainly not a case that's on all fours with the issues here.

04:13:43PM 5 The arguments that we make in response to the  
6 plaintiffs' motion are fair and invited arguments and don't  
7 amount to an amendment of our notice of removal in any way.  
8 We discuss the -- we discuss the preclusive effect  
9 of PLCAA briefly in our notice of removal, the purpose of the  
04:14:08PM10 notice is not to be a brief on -- in opposition to a motion  
11 for remand.

12 But we are not in any way attempting to amend our  
13 notice of removal and I don't think our reply brief amounts to  
14 the same.

04:14:24PM15 The --

16 **THE COURT:** Let me turn to another issue just --  
17 leaving aside the preemption argument for a minute, which I  
18 understand you are advancing vigorously.

19 Aside from that, and I know that's a big aside, but  
04:14:47PM20 do you agree that state judges routinely or at least not  
21 infrequently have to rule on federal statutory issues?

22 I mean, not to mention constitutional issues, First  
23 Amendment issues, Fourth Amendment issues, discrimination  
24 statutes, tax statutes. There are many instances where state  
04:15:12PM25 judges have to deal with federal law, which doesn't seem to me

1 a unique circumstance.

2                   Why, leaving aside preemption, why couldn't a state  
3 judge here decide the issues that you think should be decided  
4 here? They do it all the time in terms of federal law, state  
04:15:33PM 5 law, constitutional law.

6                   **MR. STAPLETON:** Your Honor, to be certain, state  
7 courts do decide issues of federal law in state proceedings.  
8 1983 actions, for example, can proceed in state court.

9                   But what the plaintiffs are doing here by trying to  
04:15:54PM10 claim that the federal -- the federal laws they cite as  
11 clearly predicate statutes and what is -- amounts to an  
12 unabashed exercise in artful pleading, is not the equivalent  
13 of asking a state court to decide a federal issue.

14                   That is a pleading that's designed to avoid a  
04:16:16PM15 preemptive effect of a federal statute, which is the proper  
16 business of a federal court to decide.

17                   My friend has cited and has said, I believe, in his  
18 articulation of his argument that precedes mine, that these  
19 are common law state claims, that they are merely citing  
04:16:37PM20 federal statutes to somehow inform or establish a duty on  
21 behalf of Gander to the plaintiffs.

22                   That is nonsense. The federal statute cited by the  
23 plaintiffs are cited for the sole purpose of avoiding the  
24 preemptive effect of the PLCAA statute.

04:16:54PM25                   The statutes they cite have no impact or relation

1 to any duty of care that can be imposed under a common law  
2 negligence theory on Gander Mountain and a simple examination  
3 of those statutes reveals that.

4                   The statutes they cite, the first two, 18, U.S.C.,  
04:17:14PM 5 Section 23 and Section 371 defined the term principal and  
6 conspiracy charges under federal criminal law.

7                   The second statute simply defines the federal crime  
8 of conspiracy.

9                   This is not a conspiracy case. This is an  
04:17:30PM10 allegation of negligence. The definition of principal as it  
11 relates to the crime of conspiracy under the Federal Criminal  
12 Code has no impact or relation to any duty imposed on it by  
13 Gander.

14                   18, U.S.C., 922(a) simply says that an individual  
04:17:47PM15 can't sell a firearm without a license. There's no issue here  
16 that Gander holds an FFL.

17                   So that statute has nothing to do with the  
18 imposition or creation of a duty or somehow supports a  
19 negligence per se claim.

04:18:02PM20                   The fourth statute they cite, 922(a)(6), is the one  
21 I believe that Dawn Nguyen pleaded guilty to in front of you,  
22 which says that a buyer of a firearm cannot knowingly falsify  
23 a firearm related record with the intent to deceive a seller.

24                   Now, how on earth that could conceivably apply to a  
04:18:24PM25 duty that Gander Mountain owed to the estate of Mr.

1 Chiapperini or Mr. Kaczowka is quite simply beyond me.

2                   **THE COURT:** Let's not get into merits here. That  
3 will be for another day either here or up the street.

4                   Your brief makes a very strong statement  
04:18:48PM 5 about state courts, which I don't think I've seen very often  
6 in briefs. That this court should exercise jurisdiction  
7 because New York state courts have already shown a bias toward  
8 local citizens in the context of PLCAA, and that an elected  
9 judge is at a risk of misapplying federal law.

04:19:16PM10                   I mean, that's a pretty strong, disparaging  
11 statement of my brother and sister judges in state court, that  
12 somehow, leaving aside the plaintiffs' arguments, that the  
13 *Williams* court didn't really do that.

14                   But, I mean, that's -- plaintiffs suggest, you  
04:19:36PM15 know, if this is not court shopping or judge shopping, we  
16 don't know what is.

17                   I don't think they said "we don't know what is,"  
18 but, I mean, that's a pretty strong statement to -- I don't  
19 say slander the state courts, but you're impugning the whole  
04:19:50PM20 New York state judiciary that they can't be fair because it's  
21 a publicized case, which happens pretty much every week around  
22 here.

23                   **MR. STAPLETON:** Judge, I think it's -- I think -- I  
24 think it's -- well, first of all, we stand by the comments we  
04:20:02PM25 made regarding the particular decision in *Woods vs. Miller*.

1                   Needless to say, it was not on my Christmas list.

2                   **THE COURT:** I said *Williams*, I'm sorry, I  
3 correctly --

4                   **MR. SCHISSEL:** It's *Williams*, Your Honor.

04:20:14PM 5                   **MR. STAPLETON:** That's correct. So --

6                   **THE COURT:** I was right?

7                   **MR. SCHISSEL:** You were right.

8                   **THE COURT:** Always happy when that happens. I'm  
9 sorry for interrupting.

04:20:21PM10                  **MR. STAPLETON:** That's okay. We certainly are not  
11 seeking to avoid any effect of *Williams*. We think *Williams*  
12 stands out as a shining example of how a state court  
13 completely implodes the obvious purpose of the PLCAA, and that  
14 is to preclude qualified access from going forward.

04:20:40PM15                  What we see in *Williams* is the wholesale subversion  
16 of a federal preemptive statute to a local Rule of Civil  
17 Procedure with no regard to congressional intent in enacting  
18 the federal statute.

19                   Now --

04:20:55PM20                  **THE COURT:** That still sounds like you just think  
21 the state courts are going to be completely biased and  
22 unwilling to accept arguments that you think they should, and  
23 that's troubling to me.

24                   **MR. STAPLETON:** Your Honor, I recognize that that is  
04:21:06PM25 a -- that is a strong statement. It's also impossible to

1 ignore what this particular case is about.

2 It's impossible. This is -- this is --  
3 this is a horrible tragedy that has had a dramatic impact on  
4 this community. I don't think, should this case ever get to a  
04:21:29PM 5 jury selection phase, which I doubt that it will, but should  
6 it ever get that far, that we're going to find a juror that  
7 hasn't heard of this, hasn't been affected by it, hasn't been  
8 impacted and knew someone who knows the Chiapperini's or the  
9 Kaczowka's or the Hofstetter's or any of the plaintiffs.

04:21:46PM10 That's a simple reality. The fact is state court  
11 judges are elected officials.

12 **THE COURT:** We get our same jury pool in federal  
13 court that they do in state court.

14 **MR. STAPLETON:** Yes, Your Honor.

04:21:56PM15 But -- but -- but Your Honor is not put that the  
16 the bench in the same process and subject to the same  
17 political influences that state court judges are.

18 **THE COURT:** Well, now I get back to my -- I mean,  
19 that doesn't give very much honor to the integrity of the  
04:22:17PM20 those judges who do have to make tough decisions and yes, face  
21 election. And I often comment that it can be difficult in  
22 that sort of a system, although the elections there are spaced  
23 out over 14 years or 10 years, which is a long time.

24 But I just -- I mean, I read your brief and the  
04:22:39PM25 plaintiffs suggest it's tantamount to judge shopping, although

1 I'm not sure why federal courts wouldn't be moved by the  
2 tragedy as well.

3 We're all human, but I think we all take an oath to  
4 uphold the law and we all try to do it as best we can.

04:22:56PM 5 **MR. STAPLETON:** And, Judge, I have no doubt of that.  
6 And I think the same argument could be leveled at the  
7 plaintiffs with equal force and effect.

04:23:10PM 8 The plaintiffs have artfully pleaded a complaint  
9 that's designed to, number one, maximize damages by placing it  
10 in the state forum and avoid a preclusive effect of a federal  
11 law. If there's anybody who is forum shopping here, it's the  
12 plaintiffs.

13 There is --

04:23:20PM 14 **THE COURT:** On the other hand, plaintiffs are the  
15 masters of their complaint. They choose the complaint, they  
16 choose the forum.

17 **MR. STAPLETON:** That's true.

18 **THE COURT:** Defendants don't.

04:23:28PM 19 **MR. STAPLETON:** Judge, that's true. The plaintiffs  
20 are the masters of the complaint. They're allowed and  
21 entitled to draft a well-pleaded complaint, and my respected  
22 opponents have drafted a very fine complaint.

04:23:44PM 23 However, they are not allowed to artfully plead in  
24 order to avoid removal or the preemptive effect of a federal  
25 statute, and that's exactly what they've done here.

1                   Judge, perhaps a more palatable argument regarding  
2 or relating to the issue of state court bias, which is really  
3 the fourth prong of the *Gunn* test.

4                   **THE COURT:** Of the what?

04:24:05PM 5                   **MR. STAPLETON:** The *Gunn* test. The four prong  
6 federal question standard established by the Supreme Court in  
7 the case of *Gunn*, which we cite in our brief very briefly, the  
8 standards, the four prongs are in order to find the federal  
9 question exists and that removal is proper under federal  
04:24:25PM10 question, there has to be a federal -- an issue that is  
11 necessarily raised, which the plaintiffs' complaint  
12 necessarily does.

13                   It has to be disputed, and obviously we are in  
14 dispute about this.

04:24:36PM15                   We claim that PLCAA has a preemptive effect on the  
16 complaint. Plaintiffs, I am sure, say it does not.

17                   The issue has to be substantial, and in the *City of New York vs. Beretta* the Second Circuit has already found  
18 substantiality in this issue relating to interstate commerce.  
19

04:24:53PM20                   The recognition that prohibited lawsuits  
21 substantially burden an industry, which is by its nature  
22 interstate, if not international.

23                   And then the fourth prong is that removal has to be  
24 effectuated such that it doesn't disrupt the congressionally  
04:25:10PM25 approved division of labor between federal and state courts.

1 That comment, that argument regarding bias, was made with  
2 respect to the fourth prong of the *Gunn* test.

3 Your Honor, I would submit to you that there are  
4 equally persuasive reasons why that fourth prong is satisfied.

04:25:34PM 5 Clearly, PLCAA does not violate separation of  
6 powers, does not violate the Tenth or the First Amendment. It  
7 does not intrude upon true local matters.

04:25:52PM 8 And Your Honor had asked me what is, in sum and  
9 substance, you know, can the state court decide federal  
10 issues? And the answer is yes. With the same frequency,  
11 perhaps less than federal courts are called upon to decide  
12 federal issues that arise out of state law claims.

04:26:12PM 13 What is equally important is that allowing this  
14 case to remain here in this court would not disrupt the  
15 balance of division of labor, it wouldn't open the flood gates  
16 of litigation.

04:26:37PM 17 And while these cases, these shooting cases, are of  
18 legitimate public concern, and there have been a number of  
19 them in recent years, there's no disputing the fact that these  
20 are rare occurrences, that shootings with semi-automatic  
21 firearms historically over decades account for less than 1% of  
22 gun crimes across the country year in and year out.

04:26:57PM 23 There's no -- there's no -- there's no question  
24 that allowing this case here, to remain here would somehow  
25 disrupt the division of labor between the state and federal

1 courts.

2                   And I say that, Your Honor, understanding that it  
3 is a tough sell to ask you to recognize that there may be a  
4 potential state court bias.

04:27:14PM 5                   So I thank you for hearing me on that issue today.

6                   **THE COURT:** Appreciate that. Well, I think we've  
7 had a good exchange here.

8                   Let me give you both perhaps the right to close  
9 without interruption from me. I say perhaps because sometimes  
04:27:34PM10 I can't control myself, but I think we've covered a lot of the  
11 waterfront. We should focus, of course, on why we are here,  
12 and that is the motion to remand.

13                   So I think, Mr. Stapleton, I'll give you first  
14 crack, but, again, in the interest of the shortness of life, I  
04:27:53PM15 think we've covered a lot of this, but if you have some  
16 thoughts, arguments that you don't think we've covered enough,  
17 you know, I'll give Mr. Schissel as the movant the last word  
18 here.

19                   **MR. STAPLETON:** Your Honor, I would just say, you  
04:28:07PM20 know, that in 2005 when Congress passed PLCAA, this court and  
21 all federal courts necessarily acquired jurisdiction over  
22 disputes concerning congressional authority, intent to preempt  
23 a subset of traditional state law claims.

24                   Regardless of the fact that the underlying causes  
04:28:26PM25 of action may arise under state law, preemption is not an

1 affirmative defense.

2 It is a matter of threshold first instance analysis  
3 in which every single one of the plaintiffs' causes of action  
4 have to be viewed.

04:28:44PM 5 I think at the risk of being redundant, I'm going  
6 to stop there and thank you for hearing me, Your Honor.

7 **THE COURT:** All right, thank you.

8 Mr. Schissel, anything you'd like to say in  
9 conclusion?

04:28:54PM10 **MR. SCHISSEL:** Yes, Your Honor, I'll be brief. Just  
11 three or four points I'd like to make, if I may.

12 **THE COURT:** Go ahead.

13 **MR. SCHISSEL:** First of all, going back to this  
14 notice of removal, I think it's important, counsel says it  
04:29:09PM15 doesn't mention affirmative defense.

16 It doesn't mention complete preemption. It doesn't  
17 mention interstate commerce. And it doesn't mention this  
18 state court bias argument, which as I hear -- read their brief  
19 and now hear counsel argue, are the three grounds on which  
04:29:27PM20 they are now seeking this court's jurisdiction.

21 And we cited -- and the reason they're doing that,  
22 Your Honor, is because we filed a motion for remand that  
23 cited -- and I won't go through it all, U.S. Supreme Court  
24 case after U.S. Supreme Court case, Western District case that  
04:29:46PM25 debunks the original grounds on which they remove, which was

1 we allege violations of federal law in the context of garden  
2 variety tort claims. That does not provide federal  
3 jurisdiction.

4 They asserted a federal statute as a defense.

04:30:01PM 5 U.S. Supreme Court cases say that doesn't provide federal  
6 jurisdiction.

7 So instead in the context of this motion, not their  
8 original removal, they come up with these three new arguments.

9 None of which for the reasons we discussed today  
04:30:16PM10 and for the reasons set forth in our brief have any merit,  
11 just like the original two arguments that they made.

12 Now, Your Honor, I would like to pass up, because  
13 we did find three additional cases and just for the record,  
14 *Lupo vs. Human Affairs International*, 28 F.3d 269,  
04:30:35PM15 Second Circuit 1994; second case is *Webgistix*,  
16 W-E-B-G-I-S-T-I-X, a 2013 Western District of New York case;  
17 and *Yorkshire-Pioneer Central School District vs. Travelers*, a  
18 2002 Western District case, that all say you cannot amend your  
19 notice of removal in the context of a motion for remand.

04:31:00PM20 Your Honor, with respect to complete preemption, I  
21 think we've been through that. The statute makes very clear  
22 that it is not creating a public or private cause of action.

23 It is explicit. And if it's that explicit, there  
24 can never -- it cannot be complete preemption, which by the  
04:31:16PM25 way, Your Honor, the U.S. Supreme Court has found in only

1 three instances.

2                   And as Your Honor said, if Congress wanted every  
3 case against the gun industry to be brought in federal court,  
4 it would have said so.

04:31:31PM 5                   Interstate commerce argument, I'll rest on our  
6 brief.

7                   The state court bias argument, as ludicrous as I  
8 think that argument is, Your Honor, even if it were true,  
9 which it is not, how does that give rise to federal  
04:31:45PM10 jurisdiction? That's not a ground for federal jurisdiction  
11 because the defendant doesn't like the jurisprudence in a  
12 state court.

13                   Finally, Your Honor, what I would like to conclude  
14 with and I'm not going to beat this to death, but just like  
04:31:58PM15 the case in Montana where the same arguments were made, and  
16 the Court said, no, that case belongs in state court, the  
17 Court found in that case that there was no objectively  
18 reasonable basis for removal. And in this case the purported  
19 grounds in the notice of removal were directly contrary to  
04:32:19PM20 U.S. Supreme Court precedent.

21                   There's no objectively reasonable basis for the  
22 three new arguments. I think this presents that rare case  
23 where an award of fees and costs associated with this motion  
24 are appropriate.

04:32:34PM25                   And with that, Your Honor, unless you have any

1 questions, we rest on our papers and I thank you for your  
2 time. And I would just like to hand up these cases and I have  
3 copies for counsel as well.

4                   **THE COURT:** Well, I'm prepared to rule.

04:32:56PM 5                   There is not a great deal of case law in this area.  
6 The statute is relatively brief and I've had the benefit of  
7 the papers submitted by both sides.

8                   I believe that plaintiffs' motion is well-founded  
9 and that the case should be remanded to state court.

04:33:23PM10                  I think, as I said, plaintiff has the right to  
11 draft their complaint, to choose the forum, and I think the  
12 burden is on the party seeking removal to demonstrate that the  
13 original forum is improper.

14                  Case law so suggests, and I think correctly so,  
04:33:49PM15 that where there's uncertainties, it should be resolved in  
16 favor of remand to state court.

17                  I think the claims that are advanced here are  
18 essentially state law claims, sounding in negligence, failure  
19 to exercise due care and so forth.

04:34:09PM20                  And I think it's clear that, although defendants  
21 raise the Protection of Lawful Commerce and Arms Act, PLCAA,  
22 at 15, U.S.C., Section 7901, et seq., possibility of raising a  
23 federal statute as a defense, which I think is what the  
24 defendants seek to do here, is not a proper ground for  
04:34:36PM25 removal.

1           I don't believe that this statute provides by its  
2 terms subject matter jurisdiction in federal court.

3           I discussed whether this statute really provides a  
4 shield against certain claims. It was not my use of the term,  
04:35:06PM 5 but Judge Lovell's in the *Woods vs. Stedman's Hardware* case, a  
6 District Court of Montana case decided last year 2013,  
7 U.S. Dist. Lexis 26261.

8           I think a thorough decision by Judge Lovell, much  
9 of which I agree with, in terms of his analysis of PLCAA and  
04:35:41PM10 whether it creates a federal cause of action and whether it  
11 does preempt any actions in state court.

12           The statute at 15, U.S.C., Section 7903(5)(c),  
13 specifically references that no provision of the act shall be  
14 construed to create a cause of action.

04:36:04PM15           I'm not convinced that that statute is one of those  
16 rare circumstances where the Congress has preempted the field  
17 and directed matters to proceed only in federal court.

18           I think Congress has done that, although in rare  
19 instances, but in my view they have not done so here.

04:36:30PM20           In other words, I don't believe there is any  
21 federal question jurisdiction here.

22           I think the statute that we have talked about does  
23 not preclude all actions against manufacturers and dealers in  
24 firearms .

04:36:53PM25           They preclude quite a lot, and I think it's a

1 question for another day as to whether plaintiffs' claims  
2 relative to some that might be considered exemptions under  
3 Section 7903(5), negligent entrustment, negligence per se, and  
4 whether the seller knowingly violated the statute, those are  
04:37:16PM 5 not insignificant hurdles.

6                   But I think Congress created these exceptions.  
7 They could have made -- they could have barred any action  
8 against a manufacturer. They chose not to do that. There is  
9 a window of opportunity for the plaintiff to attempt to come  
04:37:32PM10 within those exceptions, something we do not decide on a  
11 motion to remand.

12                  I don't accept the notion that because the state  
13 court is what it is, an elected judiciary, that sometimes,  
14 somehow that gives federal court a grounds to keep the case in  
04:38:02PM15 federal court. It's not a grounds for removal.

16                  I've carefully considered the defendants'  
17 alternative grounds and don't find them to warrant the relief  
18 that they seek, that is, to keep the case here in federal  
19 court under its original removal pleading.

04:38:30PM20               At the end of the day, I just believe that  
21 plaintiffs have the asserted state court claims and that  
22 defendants have a defense that they think is strong, but that  
23 is not a basis for this Court to allow the removal that was  
24 filed that the the grounds that it was filed.

04:38:54PM25               Based on this ruling, I don't think I need to

1 resolve plaintiffs' argument that the grounds now advanced by  
2 defendant were not initially raised in their removal notice  
3 and, therefore, should not be considered.

4 I've considered the sanction motion. I think it's  
04:39:17PM 5 a close call, but I think it is relatively unusual

6 circumstance when judges award sanctions. Counsel should have  
7 some leeway to pursue arguments that might be -- I don't want  
8 to say -- well, strong arguments that -- to advance the law.

9 This is a relatively new statute and so I decline to issue  
04:39:51PM 10 sanctions in this case, although I understand I have the  
11 authority to do so.

12 So I will grant the plaintiffs' motion to remand  
13 under 28, U.S.C., Section 1447(c). This constitutes my  
14 decision. I may write further on it, but may not. You should  
04:40:21PM 15 consider this the Court's decision.

16 I guess, Mr. Schissel, I would ask you to prepare  
17 an order, submit it to your opponent as to form within the  
18 next week.

19 **MR. SCHISSEL:** Will do, Your Honor, we will do that.

04:40:37PM 20 **THE COURT:** Anything else we can do?

21 **MR. SCHISSEL:** Nothing from me. Thank you, Your  
22 Honor.

23 **THE COURT:** Thank you both. Have safe travels back.

24 **MR. SCHISSEL:** Thank you.

04:40:45PM 25 (**WHEREUPON**, the proceedings adjourned at 4:40 p.m.)

1

\* \* \*

2

**CERTIFICATE OF REPORTER**

3

4           In accordance with 28, U.S.C., 753(b), I certify that  
5 these original notes are a true and correct record of  
6 proceedings in the United States District Court for the  
7 Western District of New York before the Honorable David G.  
8 Larimer on July 28th, 2014.

9

10 S/ Christi A. Macri11 Christi A. Macri, FAPR-RMR-CRR-CRI  
12 Official Court Reporter

13

14

15

16

17

18

19

20

21

22

23

24

25